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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 16 2004

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

[redacted]

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a textiles firm. It seeks to employ the beneficiary permanently in the United States as a warehouse manager. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date and continuing until the beneficiary obtains lawful permanent residence. The priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is August 7, 2001. The beneficiary's salary as stated on the labor certification is $30.36 per hour or $63,148.80 per year.

Counsel initially submitted insufficient evidence of the beneficiary's experience and of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated March 4, 2003, the director required additional evidence about the experience of the beneficiary and about the petitioner's business operations.

In response to the RFE counsel submitted a letter from a former employer of the beneficiary detailing the beneficiary's relevant experience. Counsel also submitted a transcript of the petitioner's Form 1120S federal income tax return for 2001 and a copy of the petitioner's Form 1120S federal income tax return for 2002.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage from the time the priority date was established up to the present. The director then denied the petition.

On appeal, counsel submits no additional evidence, but submits a brief presenting legal arguments based on evidence in the record.

Counsel states on appeal that the petitioner's gross receipts, gross profits, and total assets shown on its tax returns for 2001 and 2002 establish the petitioner's ability to pay the proffered wages. Counsel's argument on this point, however, is not persuasive, since gross receipts and gross profits are not considered to be adequate indications of a petitioner's ability to pay proffered wages. The director looked to the figures for ordinary income shown on each tax return. The tax return for 2001 showed ordinary income of $10,500 and the tax return for 2002 showed ordinary income of $9,073. The director found that these amounts were insufficient to pay the proffered wages of $63,148.80 per year. The director's conclusion on this point was correct.

With regard to the petitioner's assets as evidence of the petitioner's ability to pay, counsel refers to the petitioner's figures for total assets at the close of each tax year. However, total assets are not a valid basis for finding a petitioner's ability to pay the proffered wages, since some of those assets are needed for the operation of the petitioner's business and cannot be readily converted into cash to pay wages. Therefore only net current assets should be taken into account in evaluating the petitioner's ability to pay the proffered wages.

For the year 2001, the petitioner's schedule L shows that at the December 31, 2001 close of the tax year the petitioner had current assets of $47,759 and current liabilities of $863, for net current assets of $46,896. This amount was insufficient to pay the beneficiary proffered annual wages of $63,148.80.

For the year 2002, the petitioner's information on assets and liabilities is incomplete. The petitioner's 2002 tax return, Form 1120S, page one, line E, shows total assets of $49,840. However, the Schedule L portion of that return , which should contain details of all assets and liabilities, is completely blank. Therefore the petitioner's evidence for the year 2002, lacking information on assets and liabilities, fails to establish that petitioner's net current assets were sufficient to pay the proffered wages in that year.

Counsel argues that the petitioner's evidence includes a signed I-797 attachment dated March 19, 2003 which contains income projections establishing the petitioner's ability to pay the proffered wages. That attachment shows gross annual income of the petitioner of $300,000 and net annual income of the petitioner of $30,000, with only one employee, who according to counsel is the beneficiary. The document in question, however, is merely a one-page form apparently sent to the

petitioner as part of the RFE dated March 4, 2003. The form requests certain details about the petitioner's business. The completed form is signed by Said Chadorchi, president of the petitioner. But the completed form contains no details on how the figures for gross annual income and for net annual income were calculated, nor are any supplementary documents attached. Lacking such details and supplementary documentation, the form is insufficient to establish the petitioner's projected gross annual income or net annual income.

Counsel further argues that the beneficiary has stated under penalty of perjury on Form G-325A and on Form ETA 750, Part B that he has worked for the petitioner since January 1995. Counsel argues that this history of paying the beneficiary's wages for eight years and seven months is evidence that the petitioner will be able to continue paying the beneficiary's wages in the future. Counsel's argument on this point, however, is not supported by the evidence in the record.

The RFE dated March 4, 2003 had requested the beneficiary's W-2 forms from 1995 to the present. Counsel's response to that RFE failed to include any W-2 forms for the beneficiary. Counsel's cover letter stated, "Please note that the alien did not have a Social Security number therefore he did not file tax returns for 1995 – 2002." The director's decision noted the failure of the petitioner to provide the requested W-2 forms, as well as counsel's explanation for that failure.

Counsel's statement that the beneficiary did not file tax returns for the years 1995 through 2002 is an insufficient explanation for the absence of W-2 forms for the beneficiary. As the beneficiary's supposed employer, the petitioner had an obligation to prepare W-2 forms for the beneficiary for each year in which the beneficiary was employed by the petitioner. Any failure of the beneficiary to file his own individual tax returns would not excuse the petitioner of its own obligations to make proper tax withholdings from the beneficiary's wages and to document those withholdings on annual W-2 forms.

Other evidence in the record, moreover, indicates that the beneficiary was not in fact employed by the petitioner beginning in January 1995. A letter dated April 8, 2003 and signed by a vice president of Pacific Printex Corporation states that the beneficiary was employed by that firm on a full-time basis, 40 hours per week, from February 1994 to June 1996. In addition, a copy of Articles of Incorporation of the petitioner CHADORTEX, INC. shows them to have been signed by the incorporator Said Chadorchi on March 14, 2000 and to have been received as filed by the California Secretary of State on March 16, 2000. The Articles of Incorporation indicate that the petitioner did not exist as a legal entity prior to March 16, 2000. A City of Los Angeles tax registration certificate issued 07-20-02 for CHADORTEX, INC. contains the notation that the business was started 06-01-00.

Even for the years 2001 and 2002, for which the petitioner submitted tax information, the evidence does not establish that the beneficiary was employed by the petitioner. The tax return for 2001 shows no deduction on line eight, for salaries and wages. Similarly, the tax return for 2002 shows

no deduction on line eight, for salaries and wages. Nor do the lists of deductions itemizing line 19 "other deductions" for each of those years contain any deductions for salary expenses for 2001 or 2002. If the beneficiary was employed by the petitioner in the years 2001 and 2002, salary payments to the beneficiary should have appeared as business deductions on the tax returns of the petitioner for each of those years. The absence of such deductions is evidence that the beneficiary was not employed by the petitioner during those years. Counsel's argument that the petitioner has a history of paying wages to the beneficiary is therefore not supported by the evidence in the record.

For the reasons stated above, the evidence in the record fails to establish that the petitioner had the ability to pay the proffered wages as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.